FILE COPY.

Office Supreme Court, U. S.
FILED.
OCT 1906
JAMES H. McKENNEY,
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 90.

FRANK W. GUY ET AL.

vs.

JOHN A. DONALD.

BRIEF FOR JOHN A. DONALD.

ROBERT M. HUGHES,
Counsel for Appellee.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 23498

(19,860.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 90.

FRANK W. GUY, W. T. STANWORTH, ET AL.,
APPELLANTS,

versus

JOHN A. DONALD, APPELLEE.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR APPELLEE.

Statement.

On January 14, 1901, the appellee (libellant in court below) was the owner of the steamer "Santuit." Early that morning the steamer was coming into the Capes of Virginia from a foreign voyage. She was hailed by the Virginia pilots, and Franklin W. Guy put aboard as pilot. He thereupon took charge of her navigation. It was just about daylight, the weather was clear, and there were but one or two other vessels in the vicinity. He came on up the channel leading into Hampton Roads, and some little distance below Thimble Light sighted a schooner about three points on his port bow, and distant from one to two miles, showing her

green light. He kept on his course unchanged, the schooner keeping on hers, their courses being intersecting, as the schooner was sailing about north and the steamer west northwest, the relative positions being known to the pilot at the time. The master of the steamer, when they began to draw near, called his attention to the schooner, and urged him to do something to avoid her; but the pilot brought the steamer into collision with the schooner, the latter keeping her course to the last. The schooner was brought to Norfolk. Both parties employed counsel. Donald, the owner of the steamer, compromised with the schooner on the eve of suit, paying $3,175.

On November 10, 1902, he libeled the Virginia Pilot Association *in personam* for the amount that he had been thus compelled to pay, claiming that they were all liable for the act of Guy, the pilot in charge. The defendants, as a body, excepted to the libel on the ground that they were not jointly liable for the act of Guy. The question was argued, and the exception overruled, the court holding in its opinion that the members of the association were liable (127 Fed. R., 228).

Thereupon the defendants answered, denying liability on the facts. On the merits, the court decided that the fault was with the pilot and that the members of the association were liable, and gave judgment against them for the sum of $3,175, with interest from February 8, 1901, and $244.70 costs (135 Fed., 429). Thereupon they appealed to the United States Circuit Court of Appeals.

On the hearing in the latter court, it certified up to this court the following questions for its instruction:

First. Are the members of the unincorporated association of pilots regularly licensed under the statutes of Virginia, organized as shown by the above statement of facts, and conducting its business as thereby shown, a partnership?

Second. If it is a partnership, are its members who are regularly licensed pilots under the statutes of Virginia liable

as such to owners of vessels piloted by them for the negligence of each other?

Third. If the members of this association do not technically constitute a partnership, are they nevertheless jointly liable to third parties whose vessels they navigate as pilots for the negligent acts of each other?

The present hearing is upon those questions.

ARGUMENT.

Question I.

The Defendants are a Partnership and Liable for the Acts of Guy.

1. There is Such a Community of Profits and Losses Shown as to Constitute the Virginia Pilot Association a Partnership.

The third paragraph of the libel (R., 2) charges that the pilots have formed themselves into an unincorporated association, called the Virginia Pilot Association; that they have agreed among themselves to take turns in boarding vessels which are required to take a pilot; that by a further agreement the fees due for the individual pilot services are paid into a common fund and put in bank to the credit of the said Virginia Pilot Association; that as members of such association they own various property, including pilot boats, office furniture, etc.; that the fees collected from vessels for pilotage constitute a common fund out of which they pay all expenses incident to the business, including office expenses, expenses of operating their boats, etc., and the balance remaining after such expenses is divided among the parties; that the charges for pilotage are made out in the name of the

Virginia Pilot Association, and the bills against the said business are paid by checks of the Virginia Pilot Association.

The exception admits the truth of these allegations, but independent of that technical ground, the answer of W. T. Stanworth, one of the defendants, to the interrogatories annexed to the libel says (R., 3):

"6. How are the bills for pilotage made out, and in whose name? File with this answer a copy of one of the blank bills. A. They are made out in the name of the Virginia Pilots Association, except in cases of national vessels and disputed bills.

"7. When collections of pilotage are made, where are they put and to whose credit are they deposited? A. Sometimes in the safe in the office; sometimes deposited in bank to the credit of the Virginia Pilots Association.

"8. When bills are paid by check, how is the check signed? File one of your blank checks with this answer. A. Signed by the president, countersigned by the secretary then acting as such.

"9. What is the agreement among the members of the association as to the manner in which the profits are divided among each other, and how are the profits ascertained? A. At that time, net profits were divided equally according to the number of days a pilot was upon the active list, to say from thirty to thirty-five days, after the fixed expenses and necessary charges of the keeping of its equipment up to a seaworthy standard have been deducted from the gross earnings for this length of time."

This shows a clear community of profits and losses which, under the most rigid rules that could be applied, constitutes them a partnership.

In *Fleming v. Lay,* 109 F., 952, a number of owners of towboats formed themselves into an association and put in all their boats, adopting uniform rates, and divided the net profits among themselves in certain proportions. They were held liable as a partnership for the negligence of one of the

tugs inflicting injury upon a vessel in tow. In the opinion the court says:

"The law in respect to the facts necessary to constitute the relation of partnership has been at times in a somewhat unsettled state in many jurisdictions, but in the decisions of the Supreme Court of the United States we do not find any substantial variation of the doctrine expressed by Mr. Justice Gray in delivering the opinion of the court in *Meehan v. Valentine*, 145 U. S., 611; 12 Sup. Ct., 972; 36 L. Ed., 835, wherein he said, at the opening of the opinion, that 'the requisites of a partnership are that the parties must have joined together to carry on a trade or adventure for their common benefit, each contributing property or services, and having a community of interest in the profits;' and, again, after discussing the authorities: 'In the present state of the law upon this subject, it may, perhaps, be doubted whether any more precise general rule can be laid down than, as indicated at the beginning of this opinion, that those persons are partners who contribute either property or money to carry on a joint business for their common benefit, and who own and share the profits thereof in certain proportions.' In the case of *Ward v. Thompson*, 22 How., 330, 16 L. Ed., 249, referred to by Mr. Justice Gray in connection with the first of the above quotations, the decision turned upon the question whether, by the stipulations contained in a contract between the parties relating to the employment of the steamer 'Detroit' during the year 1852-'53, a partnership was created. The material facts were thus summarized by Mr. Justice Grier:

" 'The Wards contributed a steamboat, to be put into a line for freight and passengers, which had also a contract for carrying the mail. Thompson contributed the good will of an established line, together with his care, skill, and experience. He is to have the general management of the business, and the selection of the officers and crew; but the clerk, or receiving and disbursing agent, is to be appointed by the Wards, and to be under their control. The receipts of the steamer are to be applied (1) to pay the expenses; (2) insurance; (3) six thousand dollars to Ward; (4) three thousand dollars to Thompson; (5) the balance of the profits to be equally divided.'

"The learned justice then proceeds to say:

" 'Here we have everything necessary to constitute a partnership: First, the parties have joined together to carry on a certain adventure or trade for their mutual profit—one contributing the vessel, the other his skill, labor, and experience, etc. Second, there is a communion of profits on a fixed ratio.'

"It is extremely difficult to distinguish that case from the present in any essential particular. In that, the Wards contributed their vessel, and Thompson contributed his skill and labor. In this, the parties each contributed a vessel and their skill and labor. In that, one of the parties managed the business. So, in this. In that, the running expenses were paid out of the joint earnings. It was so here. The net earnings were divided between the parties contributing, and that was the stipulation here. What is of great significance, in both cases the profits were owned by all the parties, and they shared in them as principals. None of them received, as agent or in any other capacity, a sum out of profits which belonged to others. Moreover, in the case before us, the owner of each of the tugs was, by reason of his sharing in the ultimate profits, interested in all the sums earned in the operations of each, and correspondingly the operations of each were in the general business of all. It is not important that the minor stipulations in contracts of partnership vary. The subordinate incidents may differ, but if the enterprise is aimed to secure a joint profit which is to be divided between those contributing to the business as principals, the distinguishing features of a partnership exist. If it follows from the existence of a partnership that each should have the power of agency, it may be answered in the present case that each has delegated his power in that regard to the general manager, who thereafter, by consent, exercises the powers of each. Indeed, such delegation of power to a common agent is not an infrequent incident to the business of partnerships. It is not material that there should be any express stipulation that the losses should be borne equally in order to create a partnership. Indeed, some of the authorities hold that it is not essential to a partnership that there should be a liability to share losses. However that may be, the failure to make an express agreement upon that subject is not important, for the liability will be implied. 'Except in cases specifically provided for by statute, an agreement to share profits, nothing

being said about losses, amounts *prima facie* to an agreement to share losses also, for it is but fair that the change of gain or loss should be taken by the same persons; and it is natural to suppose that such was their intention, if they have said nothing to the contrary.' 1 Lindl. Partn. (Wentworth's Am. Ed.), 12, and see English and American cases there cited; *Bank v. Gallaudet,* 120 N. Y., 298; 24 N. E., 994. The last of the above quotations from the opinion of Mr. Justice Gray seems to us to express with great exactness the rule of law upon the subject as deduced from the decisions of that court, as well as that resulting from the modern decisions elsewhere. *Vandewater v. Mills,* 19 How., 82, 15 L. Ed., 554; *Berthold v. Goldsmith,* 24 How., 536, 16 L. Ed., 762; *Beauregard v. Case,* 91 U. S., 134, 23 L. Ed., 263. Applying that rule to the present case, it must be held that a partnership was created by their agreement."

In *Brown v. Higginbottom,* 5 Leigh, 583, a party, having leased a farm, made an arrangement with another party that the latter should furnish laborers and the former should manage it, and that the net profits, after deducting expenses, should be divided between them. The court held that this constituted a partnership.

This rule has been applied to unincorporated associations organized for profit. For instance, in *Keasley v. Codd,* 2 C. & P. (12 E. C. L.), 408, which was a suit by a harness-maker against an unincorporated company, called the London Carrier Company, the following was the ruling:

"Abbott, C. J.: Well? One must pay for all.

"Denman, for the defendant: I am in a situation to show that the company was never regularly constituted.

"Abbott, C. J.: That will make no difference. It is important that the public should know, that if persons connect themselves with a company of this description, they are every one of them liable to pay the demands upon it."

This rule was applied to a co-operative association in *Davison v. Holden,* 55 Conn., 103; 10 Atl., 515. And it has been

applied to corporations whose organization was absolutely void.

McGovern v. Robertson, 5 L. R. A., 589.
Kaiser v. Bank, 56 Iowa, 104.
Jones v. Murphy, 93 Va., 214.
Robbins v. Butler, 24 Ill., 387, 426.
R. Co. v. Pearson, 128 Mass., 445.
Frost v. Walker, 60 Me., 468.
Kramer v. Arthur, 7 Pa. St., 165.
Ricker v. Trust Co., 140 Mass., 346, 348; 5 N. E., 284.

It is no answer to this that the pilots did not intend to form a partnership. Men always intend the legal consequences of their own acts, and if their acts constituted a partnership, they cannot be heard to say that such was not their intention.

"It is sometimes said that, in order to constitute a partnership, the parties must have intended to assume that relation towards each other. But by this it is meant to say they must have intended to make such stipulations as in law constitute a partnership, and not that they intended the conclusion without regard to the conditions upon which it results as matter of law. It certainly cannot be meant to say that, where the parties have entered into an agreement which contains all the incidents of a partnership, the mere unexpressed mental apprehension of its effect will control the legal consequence. 'If,' says Lindley, 'they have in fact stipulated for all the rights of partners an agreement that they shall not be partners is a useless protest against the consequences of their real agreement.' 1 Lindl. Partn. (5th Ed.), 11."

Fleming v. Lay, 109 Fed., 955-956.
See, also, *Davison v. Holden,* 55 Conn., 103; 10 Atl., 575.
Mechem on Partnerships, sec. 43, p. 31.
Jones v. Clifford, 5 Fla., 510.

2. Even if the Pilots are Public Officers, This Does Not Affect the Question.

At the trial in the lower court it was argued that the pilots are public officers, and that there can be no partnership in a public office, and hence that they could not be liable as partners to the libellant.

The answer to this position is manifold:

(*a*) They are not such public officers as cannot go into partnership. Lawyers are as much public officers as they, but certainly, lawyers can form a partnership. The true doctrine on this subject is that a public officer cannot so far form a partnership as to allow his partner to perform any of his duties, which, to a certain extent, are personal; but this doctrine does not prevent two public officers from going into a partnership, each performing his own duties and merely dividing the profits. There is certainly nothing personal in the act of the pilots, for the pleadings show that they take turns in tendering their services. The Virginia statute requires the master of a vessel to take the first one that offers. Hence, so far as the ship at least is concerned, she has not the opportunity of any selection as among them. They are classified according to length of service, and all are supposed to be equally competent.

(*b*) Independent of this general principle, the Virginia law recognizes the right of pilots to form a partnership. The first act of consequence on the subject was that of May, 1755 (6 Hen. St., p. 490). This act provides:

"And whereas great inconveniences have arisen from pilots entering into combination or partnerships, which has occasioned great neglect of their duty; for prevention whereof:

"IV. Be it further enacted by the authority aforesaid, That from and after the first day of December next, no more than two pilots shall be in partnership, under the penalty of * * *."

By the act of December 26, 1792 (Va. Code 1803, vol. 1, page 240), this act is amended so as to provide as follows:

"12. No more than four pilots shall be in partnership under the penalty of $300 each, to be recovered with costs, for any person suing for the same."

By the act of January 23, 1802 (Va. Code 1803, vol. 1, pages 417-418), this last provision is repeated *verbatim*.

By the act of February 10, 1819 (Rev. Code, 1819, pages 121-123), the same provision is also repeated. And this continued in force until the Virginia Code of 1849, when all restrictions as to the number of pilots who could form a partnership were removed.

It is clear from this review of the Virginia statutes, first, that independent of these statutes, prior to 1755, pilots could form partnerships unlimited in number; that the effect of the acts between that date and the Code of 1849 was not to forbid the formation of partnerships, but merely to limit their number; that the dropping of this restrictive provision was a clear recognition of the right of the pilots to form partnerships unlimited in number from and after 1849.

The opposing counsel in their argument spoke of these acts as enabling acts, and claimed that their repeal in 1849 merely left the general principles of law in force.

The ingenuity which can turn them into an enabling act is certainly very remarkable. They are really disabling acts, and the effect of their repeal was to remove all restrictions. This is strengthened by the provisions of the pilot law now in force, the seventh section of which (Va. Code, sec. 1960) expressly provides:

"Every pilot, *or the company to which he belongs*, shall keep one sufficient boat of at least thirty feet keel, to which he shall be attached, and in which he shall cruise. Any one, acting as a pilot without having such a boat, shall forfeit one hundred and fifty dollars to any person who may sue for the same."

The argument of public policy in favor of holding them liable as a partnership is all on the side of the libellant.

3. Even if the Pilot Association is an Illegal Partnership, This Can Only be Set Up as Among Themselves and is No Answer to a Suit Against Them by a Third Party.

In *Brett v. Beckwith*, 3 Jur. N. S., 31, certain underwriters had gone into partnership contrary to the English statute on the subject. A party to whom they issued a policy, who was not then aware of their partnership, as one was a secret partner, sued them for a loss. The secret partner defended on the ground that the partnership was illegal. The court emphatically criticised his attempt to plead his own illegal act in defense to an obligation.

See, also, Mechem on Partnerships, sec. 20, p. 16.
Hale v. Hale, 4 Beav., 369.
U. S. v. Baxter, 46 Fed., 350.

This is certainly a very dangerous point for the pilots to make. If one of them should sue for an accounting, they might regret the record in this case.

4. There is No Well-considered Case Holding Such an Association Not to Constitute a Partnership.

But two cases can be found that even apparently favor this view. The first of these is *Mason v. Ervine*, 27 Fed., 459. It is a publication of a finding by Judge Pardee, and is not a formal opinion. It merely holds that the Louisiana pilots do not constitute a commercial partnership under the laws of Louisiana, which is the only partnership where members are liable for each other. In order to understand this decision, it is necessary to read articles 2824 to 2826 of the Louisiana Code. These articles provide as follows:

"Art. 2824. Partnerships are divided, as to their objects, into commercial partnerships and ordinary partnerships.

"Art. 2825. Commercial partnerships are such as are formed:

"1. For the purchase of any personal property, and the sale thereof, either in the same state or changed by manufacture.

"2. For buying or selling any personal property whatever, as factors or brokers.

"3. For carrying personal property for hire, in ships or other vessels.

"Art. 2826. Ordinary partnerships are all such as are not commercial; they are divided into universal and particular partnerships."

Hence this decision merely held that they were not a commercial partnership. It did not hold that they were no partnership at all.

The other decision apparently adverse is that of the *City of Reading*, 103 Fed., 696; 108 Fed., 679. There, a vessel had been anchored outside the regular anchorage grounds, and while lying in that place had a collision, and was libeled by the other vessel under the allegation that she was anchored in an improper place. The district court held, in the first place, that the vessel was not guilty of negligence, as the master could not know the channel, and had employed a regular pilot, and that the vessel was therefore not liable, whether the pilot was negligent or not. This ought to have ended the case, but the court went on and held that even if the pilot was negligent, the association was not liable for his acts; that he was not the agent of the association, and that the association itself does not attempt to take charge of vessels, and is largely a beneficial organization, and that it has no power to contract for pilotage service.

The ruling on this point is contrary to the *China*, 7 Wall., 53, that a vessel is liable for the negligence of a compulsory pilot, and yet that case is not referred to.

The other ruling is equally unsound. No question of power can arise in the case of an unincorporated association.

Such a question may arise in a chartered association, for its acts may be *ultra vires*, but an unincorporated association is not limited by any charter; and the acts of its members, or the members composing it, are its own acts. It is a truism to say that the association does not attempt to take charge of vessels. How can an association of thirty men take charge of a vessel except by sending one of their number aboard? When that one man takes charge, the whole association takes charge. It is not a question of principal and agent, but a question of partnership. The statement in the opinion that the pilot has no power to bind his associates and that his contracts do not relate to the purposes of the association stands in striking contrast to the fact—for it is a fact in this case—that the money realized from his acts is put into a common fund and kept by the association. There must be something peculiar in the organization of the Delaware Association, which differentiates it from the Virginia organzation. Whether in that association the pilot gets the separate fee or they are paid into a common fund does not appear, and yet this is important on the question of partnership; but it is clear from the report of the case that the Delaware Pilot Association does not make contracts in its own name. It is equally clear from the record in this case that the Virginia Pilot Association does. As shown by the quotations in another connection, the bills are made out in its name, checks made payable to it, and checks drawn by it. This distinguishes it from the Delaware Association and renders the case not in point on the facts.

This decision was affirmed on appeal. The appellate court, however, expressly held that neither the vessel nor pilot was in fault on the score of her anchorage, and that really disposed of the case. It went on, however, in the last page of the opinion, to pass upon this question, but it merely quoted the opinion of the district judge, holding, on the organization of that association, that no contracts were made with the association direct. On the other hand, the pleadings admit,

in this case, that the Virginia Association acts as an association, that the service rendered by the pilot was for the benefit of the association, the fees collected not by him, but by the association, and put in bank to the credit of the association. The case, if sound at all, is therefore distinguishable on the facts. In fact, the Delaware Association must be a mere beneficial organization, for an examination of the briefs filed in that case on appeal shows from its citations that such was the real point in that case. The first citation in the brief of the successful party in that case was from section 5, Book 1, chapter 1, of Lindley on Partnership, which is headed, "Clubs and societies not having gain for their object," and the cases cited by counsel in the brief were, every one of them, cases of organizations which did not have gain for their object. The citation from Lindley itself contains the following sentence:

"It follows from the proposition established in the foregoing pages that no partnership, or quasi-partnership, subsists between persons who do not share either profit or loss, and who do not hold themselves out as partners. Societies and clubs, the object of which is not to share profits, are not partnerships, nor are their members as such liable for each other's acts."

Question II.

The Members of Such a Partnership are Liable for Each Other's Torts, if in Furtherance of the Objects of the Association, and if the Fruits of Their Labors are Received by the Association.

Hyrne v. Erwin, 23 S. C., 226; 55 Am. Rep., 15.
Fleming v. Lay, 109 F., 952.
Mellors v. Shaw, 1 Best & S. (101 E. C. L.), 437.
Ashworth v. Stanwix, 3 C & E. (107 E. C. L.), 700.
U. S. v. Baxter, 46 Fed., 350.
Cobb v. Abbott, 14 Pickering, 289.
Strang v. Bradner, 114 U. S., 555.

Question III.

The Pilots, if Not a Partnership, are Jointly Liable.

This is well settled by a number of decisions, as in case of joint owners of stage coaches.

Champion v. Bostwick, 18 Wend., 174.
Moreton v. Harden, 4 B. & C. (10 E. C. L.), 223.
R. Co. v. Ross, 31 N. E., 412.
Cobb v. Abbott, 14 Pickering, 289.
Steel v. Lester, L. R., 3 C. P. D., 121.
Connelly v. Davison, 15 Minn., 428, 519.

Conclusion.

All three questions should be answered in the affirmative.

Respectfully submitted,

ROBT. M. HUGHES,
For Appellee.

NORFOLK, VIRGINIA, *October* 17, 1906.